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IN THE

Supreme Court of the United States

October Term, 1980

JOHN R. LARSON, Commissioner of Securities, Minnesota Department of Commerce; WARREN SPANNAUS, Minnesota Attorney General; Individually and in their official capacities,

Appellants,

v.

PAMELA VALENTE, LARRY BARBER, LARRY HAFT, KIMBERLY KORMAN, and HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY,

Appellees.

BRIEF OF THE AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

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QUESTION PRESENTED

Whether a state statute regulating charitable solicitations under which religious organizations which solicit more than half of their funds from the public must register with the state and file periodic financial statements, while religious organizations which look to the public for less than half of their support are exempt from those requirements, violates the Establishment Clause.

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INTEREST OF THE AMICUS

This brief amicus curiae of the American Jewish Congress in support of the Appellees is submitted with the consent of the parties.

The American Jewish Congress is a membership organization of American Jews founded in 1918 to protect the religious, political and economic rights of Jews and to promote the principles of democracy. It is committed to the preservation of the great freedoms secured by the First Amendment, and especially the unitary freedoms secured by its Establishment and Free Exercise Clauses.

The American Jewish Congress has participated in a large number of church-state cases before this and other courts. It believes that its deep commitment to the

First Amendment and its accumulated experience in this field permits it to make a unique contribution to the discussion of the Constitutional issues involved in this case.

STATEMENT OF THE CASE

Four individual members of the Holy Spirit Association for the Unification of World Christianity [the Unification Church] brought suit, pursuant to 42 U.S.C. § 1983, in the United States District Court for the District of Minnesota seeking a declaration that the Minnesota Charitable Solicitations Act, Minn. Stat. §§ 309.50-309.61 (1980) [the Act], violates the First and Fourteenth Amendments of the United States Constitution and seeking an injunction prohibiting its enforcement. Named as defendants were the two state officials charged with enforcing the Act.

The Act prohibits charitable organizations, including religious ones, from soliciting contributions from persons in the State unless the organization has filed

a registration statement setting forth certain information regarding itself, its purposes, its methods of solicitation, the ends to which contributions will be put, the amount of contributions it has received, and "other information which might be required by the state." The initial registration statement must include a financial statement of the organization's operations and, with certain exceptions not relevant here, an organization which is required to file a registration statement must also file annual financial reports.

Under a series of statutory exemptions, certain charitable organizations are exempt from the registration and annual reporting requirements. In fact, prior to 1978, the Act, in effect, exempted all religious organizations. A 1978 amendment, however, eliminated the blanket exemption for

religious organizations. Under the amended statute, Section 309.515(b) of the Act, a special exemption is still carved out for religious organizations, but only for those which receive more than half of their contributions from persons who are members of the organization, or from a parent or affiliate of the organization or from a combination of those sources.

Plaintiffs' complaint, which was accompanied by a motion for a preliminary injunction, raised a number of challenges to the constitutionality of the statute, including a claim that the disparate treatment of religious organizations under Section 309.515(b) violated the Establishment Clause of the First Amendment.

Before the application for a preliminary injunction was heard, the State of Minnesota filed suit in state court against

the Unification Church, charging that the Church was in violation of certain provisions of the Act. By stipulation, the Unification Church was joined as a plaintiff in the federal suit, and the state court action was stayed.

The District Court, following the Report and Recommendation of the United States Magistrate who heard the application for a preliminary injunction, granted the plaintiffs a preliminary injunction. Thereafter, that court granted summary judgment and permanently enjoined the enforcement of the Act as to any and all religious organizations.

The Court of Appeals for the Eighth Circuit, limiting its review to issues actually decided by the District Court and declining to rule on the other theories of unconstitutionality asserted by the

plaintiffs, affirmed the District Court's ruling that the Act's distinction between religious organizations which receive more than half of their contributions from members and those which receive less than half from their members was invalid under the Establishment Clause.

The state appealed. This Court noted probable jurisdiction on June 1, 1981.

SUMMARY OF ARGUMENT

A neutrality principle lies at the heart of the Establishment Clause. Accordingly, governmental regulation of religious organizations or their activities must, at minimum, apply in a neutral, evenhanded, non-discriminatory manner. The exemption from regulation of religious organizations which raise more than half of their funds from members violates this neutrality principle, and therefore violates the Establishment Clause.

The same conclusion follows if the statutory classification and exemption are analyzed under the familiar tri-partite test. The statute fails under each prong of that test.

The exemption appears to be a purposeful religious gerrymander. Sparse as

the legislative history may be, it supports the view that the legislative purpose was to subject to regulation those religious groups, such as the Appellee Unification Church, whose solicitations in public places have been particularly controversial.

The effect of the statutory classification is to create two classes of religious organizations and to treat them differently. The criteria which determine which class a religious organization falls into are inherently religious.

The exemption is not closely tailored to the state's articulated aim -- to regulate only those organizations where adequate internal safeguards do not exist. Even if there were a rational relationship between the statute and that goal, in this sensitive First Amendment area, mere rational relationship between means and ends is

not enough to satisfy the Constitution's mandate.

Finally, the statutory classification fosters an excessive governmental entanglement with religion. Because the criteria which determine inclusion or exemption have religious content, the state, in enforcing the statute, may be compelled to make determinations which it is incompetent to make.

ARGUMENT

I. The Statute Violates the Establishment Clause's Mandate of Scrupulous Government Neutrality Among Religions

Undoubtedly, not all regulation of the activities of churches is proscribed by the Religion Clauses of the First Amendment.

> A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church .... [O]ur State and Federal Governments impose certain burdens upon, and impart certain benefits to, virtually all our activities, and religious activity is not an exception.

Roemer v. Board of Public Works, 426 U.S. 736, 745 (1976). At the same time, the Free Exercise and Establishment Clauses of the First Amendment do operate to place limits on the scope and nature of state

regulation of religious organizations and their activities. Under those clauses, "a hermetic separation" of church and state may not be required. Id. at 746. But "scrupulous neutrality as among religions" is. Id. at 745.

Just as reasonable time, place and manner restrictions which serve significant governmental interests and which apply in an "even-handed," "non-discriminatory fashion" "to all alike" may not offend the free speech guarantees of the First Amendment, see Heffron v. International Society for Krishna Consciousness, Inc., U.S. , 101 S.Ct. 2559 (1981), even-handed, non-discriminatory regulation of religious solicitations may, under some circumstances, exist without offense to the Religion Clauses. But rules and regulations

The statute is not evenhanded and non-discriminatory in its treatment of religious organizations and it therefore violates the Establishment Clause. "If the purpose or effect of a law ... is to discriminate invidiously between religions, that law is constitutionally invalid ...." Braunfeld v. Brown, 366 U.S. 599, 607 (1961).

The manifest violation of the First Amendment's neutrality principle is sufficient to invalidate the Minnesota Act. Not surprisingly, the same conclusion of invalidity emerges if the statute is analyzed under the now familiar tri-partite test for determining whehter a challenged statute is permissible under the Establishment Clause. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither

affecting the activities of religious organizations which are not evenhanded, which do not apply to all alike, and which are discriminatory either on their face or as applied are forbidden.*

The statute at issue here purports to regulate charitable solicitations, including those of churches. It does so, in part, through imposition of detailed registration and reporting requirements. These requirements, however, apply only to certain religious organizations. Under the statutory scheme, other organizations are exempt.

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* The amicus expresses no opinion as to whether the registration and reporting requirements would be constitutional if the exemption for religious organizations with a preponderance of member or affiliate funding were eliminated. We do note that the Appellees have urged that the statute suffers from a number of other constitutional defects and we think their objections are not insubstantial.

advances nor inhibits religion ....; finally, the statute must not foster an excessive government entanglement with religion." Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). If a statute violates any of these three tests, it must be struck down. The amicus submits that the challenged statute violates all three.

II. The Statute Violates Each Prong of the Tri-Partite Test

A. The Exemption of Some Churches from the Regulatory Scheme and the Inclusion of Others Serves No Valid Secular Purpose

There can be little doubt that the Minnesota Act, viewed as a whole, has a valid secular purpose -- the prevention of fraudulent and deceptive conduct in the solicitation of funds in the name of charity and the disclosure of facts which may be useful to the public in evaluating such

solicitations. See Heffron v. International Society for Krishna Consciousness, Inc., supra; Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 636 (1980). But, in order to withstand scrutiny under the Establishment Clause, it is the 1978 amendment's classification of religious organizations on the basis of the percentage of funds they receive from members and non-members, and their inclusion in, or exclusion from, regulation on that basis, which must pass the test of valid secular purpose. The classification does not pass the test.

The Court of Appeals ruled that there exists no sound and justifiable purpose for the statute's system of classification. It determined that the classification appeared to be a religious gerrymander, reflecting favoritism for religious organizations

which obtain some, but less than half, of their funds from the public. Appellants attack that ruling, charging that it rests exclusively upon unwarranted assumptions concerning legislative motive.

Appellants' own recounting of the legislative history, however, provides strong support for the assumptions they call unwarranted. According to the Appellants, the 1978 amendment's change in the treatment of solicitation by religious organizations received little legislative attention. Jurisdictional Statement at 12. What little legislative history exists, however, suggests that the classification was designed with a view towards regulating the fundraising activities of particular "disfavored" religious groups.

In the Senate Judiciary Subcommittee hearing on the bill, it was stated that the

amendment would allow the state to regulate those organizations soliciting in airports and in the streets. Id. at 13 The question of the regulation of airport solicitations arose as well in a House committee meeting. Id. It is not speculation to conclude from these comments that the legislators who enacted this bill purposefully intended to subject to regulation those religious organizations, such as Appellee Unification Church, whose airport and street solicitations are well-known and little liked. At the same time, the exemption provision can only reflect the legislature's clear purpose to relieve other religious groups of the regulatory burden.

This Court's well-founded reluctance to inquire into a statute's real purpose or its drafters' "true motives" where the statute can rationally be thought to promote

legitimate ends has no place where a statute is challenged as violative of the Establishment Clause. Valid secular purpose is a sine qua non of constitutional validity. See Stone v. Graham, U.S. 101 S.Ct. 192 (1980); Epperson v. Arkansas, 393 U.S. 97 (1968); L. Tribe, American Constitutional Law 229 (1978).

The invalid purpose -- to regulate certain churches and to release others from regulation -- appears on the face of the statute. The legislative history supports what logic suggests -- that the groups chosen to be regulated were those sects, like the Appellee, which are unpopular in some quarters. On the other hand, the secular purpose now advanced by the state for the exemption -- regulation of only those organizations as to which membership funding is too insubstantial to supply

sufficient internal safeguards against fraudulent and deceptive fundraising -- finds no support at all in the legislative history cited by the Appellants. It appears to be no more than a post hoc rationalization designed to explain away the improper legislative purpose.

B. The Exemption Has An Impermissible Effect

The uncontrovertable effect of the statute is to create two classes of religious organizations. The churches within one class are subject to the onerous burdens of registration and periodic reporting. The churches in the other class are left alone, exempt from those obligations. Whether or not the dividing line between the two classes coincides with the line between well-established and newer religions or with the line between favored or disfavored sects, the

First Amendment does not tolerate the drawing of any such line by the State.

This Court has written:

> Almost a hundred years ago in Minor v. Board of Education of Cincinnati, Judge Alphonso Taft, father of the revered Chief Justice, ... stated the ideal of our people as to religious freedom as one of "absolute equality before the law, of all religious opinions and sects .... The government is neutral, and, while protecting all, it prefers none, and it disparages none."

School District of Abington Township v. Schempp, 374 U.S. 203, 214-15 (1963) (footnote omitted). That principle has been reaffirmed repeatedly. "State power is no more to be used so as to handicap religions than it is to favor them." Everson v. Board of Education, 330 U.S. 1, 18 (1947).

The classification in the challenged statute protects, prefers, and favors some

churches while it disparages and handicaps others. Indeed, the state implicitly concedes as much for, in attempting to justify the exclusion of religious organizations which receive more than half of their funding from members, the state asserts that it does so to remove the onus of registration where other adequate safeguards exist. Were the registration and reporting requirements not burdensome, there would be no reason for the exemption.

The statute and its invidious classification cannot be saved merely by calling them secularly-based.* In spite of the

* Appellants contend that Gillette v. United States, 401 U.S. 437 (1971), stands for the proposition that any legislation with a disparate impact on religious groups is permissible under the Establishment Clause so long as a neutral, secular reason to justify the law can be articulated. Plainly, that cannot be the law for such a rule would eliminate two-thirds of the tri-partite test. Gillette itself recognizes that the central purpose of the Establishment Clause is to ensure government neutrality in matters of religion. (cont.)

state's assertions to the contrary, the statute's classification is not, and cannot be, an entirely secular one.

A religious organization's membership structure, its funding base, and its fund-raising practices are inherently tied up with that organization's religious functions and beliefs. Some churches, for doctrinal reasons, are membership organizations. Others are not organized on a membership

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Unlike the conscientious objector statute at issue in Gillette, the statute challenged here expressly creates two classes of religious organizations and mandates different treatment of the two. And, unlike the legislative scheme at issue in Gillette, alternative legislative solutions exist. Other means exist for the state to prevent fraudulent solicitations and to promote public disclosure without increasing the danger of government entanglement and without enhancing the likelihood of erratic decisionmaking, the two dangers which only the statutory scheme at issue in Gillette could avoid. One means would be complete exemption of religious solicitations, as existed in Minnesota prior to 1978, and vigorous enforcement of criminal and civil fraud statutes. The public interest in promoting public disclosure might be adequately served by permitting registration and reporting by religious organizations on a voluntary basis.

basis. Some religious organizations, again for doctrinal reasons, rely upon their members for financial support. Other religious beliefs of other religious organizations call for evangelizing and solicitation of persons outside the church. Indeed, for some religions, solicitation of donations is itself a religious ritual.

Accordingly, even if the line chosen by the State was chosen for purely secular purposes, its effect is inevitably to classify churches, and to treat them differently, on the basis of criteria with religious content.

It is true that legislation which is addressed to a wholly secular problem, but which does not affect all religions identically, does not inevitably violate the Establishment Clause. But legislation designed to regulate religious groups and

their operations is surely suspect. The State must in those cases bear a heavy burden of justification if the statute is to survive scrutiny under the Establishment Clause. See Surinach v. Pesquera de Busquets, 604 F.2d 73 (1st Cir. 1979). The line which the statute draws at best only roughly serves the State's asserted interests in protecting potential donors from fraudulent solicitations and promoting disclosure to the public. In this sensitive First Amendment area, rough justice is not enough.

According to the State, the exemptions are tied to the Act's purpose of providing protection and information to the public, but only in the case of an organization which receives one hundred percent membership funding does the exemption serve that purpose. In organizations funded both

by members and non-members, but primarily by the former, member-donors may be protected through adequate alternative safeguards in the form of a statutory right to inspect books and records but those safeguards, by their terms, cannot be invoked by non-member donors and cannot serve to promote disclosure to the public of an organization's financial affairs.

It is not necessarily the case that membership funding in excess of fifty percent will be accompanied by broadbased membership overview and supervision of a church's financial affairs. An organization will be exempt if one very generous member-donor contributes more than half of the organization's funding, even though the remainder of the organization's funds come from non-member contributors. In such a case, there is no reason to believe

that the membership at large will have a special interest in the disposition of the funds collected. Indeed, it is only the large contributor and the non-member public which have a financial interest in monitoring their disposition and the two may have different interests entirely. The exemption in that case does not operate to protect the public and to provide it with information; in fact, the exemption undercuts the statutory purpose.

C. The Exemption Fosters an Excessive Entanglement with Religion

A statutory scheme which required registration and reporting by all religious organizations soliciting funds from the public would result in some entanglement. We express no view on whether that entanglement would be excessive within the meaning of the Establishment Clause. Paradoxically,

though, the Minnesota scheme, which exempts some religious groups, is more entangling than a scheme which exempts none. This is so because the statutory basis for exemption is the percentage of contributions solicited from non-members. The resulting entanglement, though perhaps difficult to quantify, is excessive.

Inclusion or exemption depends on percentage of funds received from "members." The state, however, has chosen not to defer to each church's own definition of membership. Section 309.515(b) prohibits a church from defining members to include "those persons who are granted membership upon making a contribution as a result of a solicitation." Moreover, § 309.591 authorizes the Commissioner of Securities and Real Estate to make "such rules as are reasonably necessary to carry out [the] purposes of this chapter,"

including, apparently, additional, more comprehensive rules defining membership.

Indeed, the state must promulgate such regulations for there are no doubt churches which grant "membership" status to all those who provide financial support, or for which the concept of membership is entirely alien. See The Young Life Campaign v. Director of Employment, Cal. App. 3d , 176 Cal. Rptr. 23 (3d Dist. (1981) (court overturned agency determination that youth ministry was not a church for purposes of state unemployment taxes because it had no members).

Clearly, it is no business of the state to define church membership. In addition, any attempt by the state to insure that churches were not defining membership in violation of § 309.515, or of promulgated

regulations, would inevitably lead to improper, on-going surveillance of churches and their members of the type this Court has condemned elsewhere.* See, e.g., Walz v. Tax Comm'n, 397 U.S. 664 (1970); PEARL v. Nyquist, 413 U.S. 793 (1973).

Entanglement problems can arise in yet other, more mundane ways. How will the state deal with revenues from a collection plate, where there is no way to know whether members or non-members made the contribution? Might churches feel (or be) obligated to discontinue that practice? What about churches which receive or encourage anonymous contributions.

The resolution of these and other

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* This surveillance might well violate the Free Exercise Clause. However, because there are no Free Exercise issues now before this Court, we do not address that issue here.

similar questions will undoubtedly result in state supervision and regulation of, and interference with, religious activity on a continuing basis. Particularly because the legislature has given the agency charged with enforcement of the Act no guidance in resolving these questions, this entanglement is constitutionally objectionable.

CONCLUSION

For the reasons set forth above, the American Jewish Congress, amicus curiae, respectfully urges that this Court affirm the ruling of the Court of Appeals that Section 309.515(b) of the Act violates the Establishment Clause.

Respectfully submitted,

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